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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 199

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GLENSHAW GLASS CO. AND WILLIAM GOLDMAN THEATRES, INC.,
Respondents.

ON CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF ON BEHALF OF DEAN MILK COMPANY AS AMICUS CURIAE.

THOMAS C. MCCONNELL,
Attorney for Dean Milk Company, a corporation.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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MOTION FOR LEAVE TO FILE A BRIEF ON BEHALF OF DEAN MILK COMPANY AS AMICUS CURIAE.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes DEAN MILK COMPANY, a corporation, by Thomas C. McConnell, its attorney, and asks leave of this Court to file instanter a brief as *amicus curiae* in the instant case, and for cause shows:

This proceeding originated upon petitions for redetermination of deficiencies determined by the Commissioner of Internal Revenue against *Glenshaw Glass Co.* and *William*

Goldman Theatres, Inc., on account of the recovery of punitive damages or the two-thirds penalty part of a Clayton Act recovery.

The Commissioner appealed two decisions of the Tax Court of the United States, reported in 18 T. C. 860 and 19 T. C. 637, in favor of these two taxpayers, and the Court of Appeals for the Third Circuit affirmed the Tax Court decisions in an opinion reported in 211 F. 2d 928. Certiorari was granted by this Court on October 14, 1954, and the case has been placed on the summary docket.

Movant corporation received by settlement the sum of $1,225,000 in satisfaction of its claims under the Sherman Act for loss of profits and treble damages occasioned by virtue of an illegal monopoly and conspiracy in the milk business in the City of Chicago. The case is docketed in the United States District Court for the Northern District of Illinois, Eastern Division, as "*Dean Milk Company* v. *American Processing and Sales Company, Inc., a corporation, et al.,*" No. 49 C 1159.

Movant corporation has been advised by the Commissioner of Internal Revenue that whether or not two-thirds of the sum it received in settlement of the aforesaid action is taxable depends upon the decision of this Court in the instant case.

While the present state of the tax law is adequately briefed by the litigants in the present case, we understand that important questions of public policy involved in the effect of a decision declaring the penalty provisions of the anti-monopoly laws taxable income have not been brought to the attention of the Court.

Since the enforcement of the anti-trust laws has been encouraged by the Congress by the grant of treble damage judgments, to construe the tax laws in a way to include such punitive penalty as taxable income is to destroy any

incentive to private litigants to engage in treble damage litigation and to thwart the express intention of the Congress to provide effective anti-trust law enforcement through the adjunct of private suits.

As pointed out in the accompanying brief, the private treble damage action is an important adjunct to the enforcement of the anti-trust laws by the Department of Justice. A decision in the instant case which would permit the taxing away of the penalty provided by the statutes would to that extent render nugatory the treble damage incentive created by the Congress for the enforcement of the anti-trust laws.

WHEREFORE, DEAN MILK COMPANY asks leave to file instanter the accompanying brief as *amicus curiae*.

Respectfully submitted,

DEAN MILK COMPANY, *a corporation*.
By THOMAS C. MCCONNELL,
Its Attorney.

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ON CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM OF DEAN MILK COMPANY AS AMICUS CURIAE.

This is a suit originated upon petitions for redetermination of deficiencies determined by the Commissioner of Internal Revenue against *Glenshaw Glass Co.* and *William Goldman Theatres, Inc.*, on account of the recovery of punitive damages or the two-thirds penalty part of a Clayton Act recovery.

The contention of the Commissioner of Internal Revenue in the instant case raises squarely the question of a conflict between two Acts of the Congress and between two law enforcement agencies of the government in the event

that the tax laws are construed to permit the taxing of penalties and punitive damages created by the Congress as a means of effective anti-monopoly enforcement.

In *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 728; 88 L. Ed. 1024, 1038, this Court, after referring to the statutory provisions authorizing persons injured by violation of the anti-trust laws to bring suit for injunctive relief and to sue for threefold damages, said:

> "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes."

It must be assumed that the Congress believed that there was need for each of the remedies which it provided. Any decision by this Court which substantially militates against the effectiveness of one of the remedies is of serious public consequence.

In an *amicus curiae* brief filed by the Solicitor General of the United States in *Bigelow, et al.* v. *RKO Radio Pictures, Inc., et al.*, 327 U. S. 251; 90 L. Ed. 652, heard by this Court, it was stated:

> "While the Government endeavors to enforce vigorously the remedies granted to it, triple-damage suits by injured private parties are an important supplementary aid in bringing about obedience to the commands of the statute."

In *Maltz* v. *Sax*, 134 F. 2d 2, cert. denied, 319 U. S. 772, the Court of Appeals for the Seventh Circuit said at page 4:

> "* * * This grant to persons damaged—a cause of action for treble damages—was for the purpose of multiplying the agencies which would help enforce the Act and therefore make it more effective.
>
> "All of the provisions and purposes of this Act must be construed together, with its main purpose that of protecting the public against restraints of commerce, clearly its major object."

Obviously, a construction of the taxing statutes which renders taxable and thus in practical effect nugatory the

treble damage provisions of the anti-trust laws discourages the institution and prosecution of treble damage suits, and thus militates against the legislative purpose of the Congress in protecting the public against restraints of commerce.

Under the best of circumstances the prosecution of a treble damage suit is heavily weighted in favor of the defendants. The loss of such a suit may result in retribution by the defendants and in revengeful tactics which in practical effect may put the complaining party out of business.

The inclusion of treble damages in an award for injuries sustained by reason of a violation of the Act, as a practical matter and as the Congress well knew, is a necessary inducement for a private litigant to undertake such litigation. Further, the practical difficulty involved in making the meticulous proof of damages required by the courts justifies the inclusion of treble damages in the award. See decisions of the United States Court of Appeals for the Seventh Circuit in *Bigelow, et al.* v. *RKO Radio Pictures, Inc., et al.*, 150 F. 2d 877, and in *Milwaukee Towne Corporation* v. *Loew's Incorporated, et al.*, 190 F. 2d 561.

Most treble damage suits are brought to recover profits lost during a period of some years duration—usually the statutory period for the limitation of actions. Under present income tax regulations such recovered profits are taxable in the year of receipt, and thus under graduated rates are taxed in a much higher amount than if the business had not been illegally interfered with and the income had been received in the years for which damages are recovered. The present treble damage provisions and the present construction of the Courts rendering them nontaxable to some extent remedies this inequity. To now change the law and to tax all the recovery, including the treble damage portion, would leave the successful litigant,

after a prolonged and arduous litigation, with nothing but a Pyrrhic victory. Nor will the revenue be benefited ultimately because such a change in the tax law will most assuredly discourage such litigation altogether. No private litigant is going to make the tremendous investment in time, money and energy necessary to litigate a treble damage action through the courts merely for the purpose of paying the recovery to the Government. The net result will be not only no treble damages to tax but no compensatory damages as well on which to levy a tax.

On the appeal below (211 F. 2d 928, 933) the Court said:

> "* * * Punitive damages seem to be *sui generis*. By definition they are not compensatory. They certainly possess no periodicity. They are not derived from capital, from labor or from both combined and assuredly they are not profit gained through the sale or conversion of capital assets. It is clear that they do not fall within the definition of Eisner *vs.* Macomber * * *."

This Court has refused to overturn the definition of taxable income set forth in *Eisner* v. *Macomber*, 252 U. S. 189; 64 L. ed. 521; 40 S. Ct. 189.

In *Helvering* v. *Griffiths*, 318 U. S. 371, 401; 87 L. Ed. 843, 863, this Court said:

> "The Court differs, however, from other branches of the Government in its ability to extricate itself from error. It can reconsider a matter only when it is again properly brought before it in a case or controversy; and if the case requires, as a tax case does, a statutory basis for a case, *the new case must have sufficient statutory support.*" (Italics ours.)

In the instant case, the present state of the law holding punitive damages not subject to taxation has the support of the decisions of the Tax Court and of the Court of Appeals for the Third Circuit. The Congress has just recodified the tax laws and nowhere in such re-codification

is there any statement that punitive damages are taxable as income. Certainly if the Congress held a different view than that stated by the courts it would have said so. Certainly to read such an interpretation into the revenue laws is to thwart completely the enforcement of the anti-trust laws through the adjunct of private litigation.

In the instant case the Congress has not seen fit to change the definition of income set forth in *Eisner* v. *Macomber* or to specifically tax punitive damages or penalties although the tax decisions have long exempted them.

We submit that on grounds of well-defined public policy this Court should not now rewrite the definition of taxable income to include penalties where the practical effect thereof would be to render of no avail an important adjunct to the enforcement of the anti-monopoly statutes provided by the Congress.

WHEREFORE, we most respectfully submit that the decision of the Court of Appeals for the Third Circuit in the instant case should be affirmed.

Respectfully submitted,

THOMAS C. MCCONNELL,
Attorney for Dean Milk Company, a corporation.